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87-7311 *87-7311*

IN THE

SUPREME COURT OF THE UNITED STATES

— October Term, 1987

DEWAINE POINDEXTER,

Petitioner

-vs-

NO. _____

THE STATE OF OHIO,

Respondent

On Writ of Certiorari to
The Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF OHIO

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QUESTIONS PRESENTED FOR REVIEW

I.

WHETHER A DEATH VERDICT BY A JURY IS CONSTITUTIONALLY UNRELIABLE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES WHERE IT FOLLOWS THE FALSE STATEMENT BY THE PROSECUTOR DURING ARGUMENT AT THE PENALTY PHASE, SEEKING TO NEGATE THE EXISTENCE OF THE STATUTORY MITIGATING FACTOR OF LACK OF A SIGNIFICANT HISTORY OF PRIOR CRIMINAL CONVICTIONS AND/OR JUVENILE DELINQUENCY ADJUDICATIONS, TO THE EFFECT THAT THE ACCUSED HAD HAD FIVE PRIOR CONTACTS WITH THE JUVENILE JUSTICE SYSTEM, WHEN IN FACT THE OFFENDER HAD ABSOLUTELY NO CONTACTS WITH THE JUVENILE JUSTICE SYSTEM.

II.

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION ARE PREJUDICIALLY VIOLATED BY THE USE BY PROSECUTORS ARGUING FOR THE DEATH PENALTY IN THE PENALTY PHASE OF A CAPITAL TRIAL OF SELECTIONS OF PRIOR OPINIONS OF THIS COURT, OUT OF CONTEXT, TO PERSUADE THE SENTENCING JURY THAT THIS COURT APPROVES OF CAPITAL PUNISHMENT.

III.

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED BY THE IMPOSITION OF THE DEATH SENTENCE AFTER A JURY DEATH VERDICT WHERE THE JURY IS INSTRUCTED THAT THEIR "RECOMMENDATION" IS ONLY A RECOMMENDATION AND THAT ACTUAL SENTENCE SHALL BE IMPOSED BY THE TRIAL COURT AFTER "ADDITIONAL PROCEDURES" ARE CONDUCTED.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF THIS COURT IN CALDWELL V. MISSISSIPPI.

IV.

WHETHER THE EIGHTH AMENDMENT REQUIREMENT OF RELIABILITY IN THE IMPOSITION OF THE DEATH SENTENCE REQUIRES A STATE SUPREME COURT, MANDATED CONSTITUTIONALLY TO CONSIDER APPEALS WHERE THE DEATH SENTENCE HAS BEEN AFFIRMED, TO GIVE FULL REVIEW TO EACH ISSUE RAISED BY THE CAPITAL DEFENDANT UPON HIS APPEAL TO THAT COURT.

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PETITION FOR A WRIT OF CERTIORARI TO

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PETITION

Dewaine Poindexter, Petitioner herein, respectfully prays for an order granting a Writ of Certiorari to review the judgment of the Supreme Court of Ohio affirming his conviction and death sentence for aggravated murder, aggravated burglary, kidnaping, felonious assault and attempted aggravated murder.

OPINIONS BELOW

The decision of the Supreme Court of Ohio affirming Dewaine Poindexter's convictions and death sentence was rendered March 23, 1988, is reported at 36 Ohio St.3d 1, 520 NE2d 568, and is attached hereto as Appendix A. The decision of the Court of Appeals, which is unreported, is attached hereto as Appendix B. The trial court's opinion justifying the death sentence appears as Appendix C. The decision of the Supreme Court of Ohio, denying rehearing on April 20, 1988, is attached hereto as Appendix D. The opinions being voluminous, they are presented in a separately bound appendix.

JURISDICTION

This Petition is timely filed, within 60 days of the judgment below on April 20, 1988, denying Petitioner's timely application for rehearing, and is founded upon 28 U.S.C. 1257(3), Petitioner asserting here, and in the courts below, violations of rights secured to him by the Constitution of the United States.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions being voluminous, they are appended hereto as Appendix E.

STATEMENT OF FACTS

Dewaine Poindexter, Petitioner herein, stands convicted by the Court of Common Pleas of Hamilton County, Ohio, on all counts of a six-count indictment which charged him with two counts of the aggravated murder of Kevin Flanagan, aggravated burglary, felonious assault, kidnaping, and attempted aggravated murder. Sentenced to death on two counts, and maximum consecutive sentences on all the other counts, he appealed. From the affirmance of his convictions and death sentence by the Court of Appeals and the Ohio Supreme Court, Dewaine Poindexter brings this Petition.

Dewaine Poindexter had lived for about two years with Tracy Abernathy, who bore him two sons (R. 368-9). In the fall of 1984, Dewaine was sentenced to six months in the Community Correctional Institution (CCI) for an assault on Tracy. He was released on February 15, 1985. During his incarceration, Dewaine became disturbed because he had heard that Tracy was prostituting herself, a fact she did not deny at trial (R. 376-377). Some time after Dewaine was incarcerated, Tracy began living with Kevin Flanagan in the Fay Apartments in the Fairmount area of Cincinnati.

Tracy testified that she and Flanagan were asleep in their townhouse on the morning of February 19, 1985, when they heard glass breaking downstairs. They went downstairs to investigate, and were met by a man she identified as Dewaine on the stairs. He was armed with a pistol and ordered them

back up the stairs and into their bedroom. The gunman shortly thereafter fired one shot into Flanagan's chest; Flanagan fell back on the bed and died within minutes, as the bullet had severed an artery (R. 555-6).

A neighbor had witnessed the break-in and had alerted the security guard at the apartment complex, John Hurt. Hurt responded and was confronted by the gunman and Tracy leaving the apartment. The gunman forced Hurt and Tracy back into the apartment, up the stairs, and into the bedroom. Hurt was forced to kneel facing the gunman, who fired a shot from a distance of 18 inches or so to either side of Hurt's head, and fired once again when (according to Hurt) the gun was pointed at his head, but the gun did not fire. Hurt identified the gunman as Dewaine Poindexter (R. 405-6).

The gunman then forced Tracy and Hurt outside at gunpoint, and fled. Another neighbor, Andrew Leonard, confronted a man he identified as Dewaine, who threw a gun into a dumpster (R. 428). The police had been summoned by Hurt, and Leonard pointed the dumpster out to officer Luebbe, who recovered the weapon. Ballistics tests indicated that this gun had been used to shoot Flanagan (R. 600). Police experts testified to the ballistics and also that Dewaine's fingerprint was found on a cartridge casing found at the scene of the shooting (R. 573).

One Lee Holmes testified at the trial that he was acquainted with Tracy Abernathy, and knew Dewaine to see him. Holmes was incarcerated at CCI from February 8 to April 30, 1985, and testified that he had had a conversation with Dewaine while both were incarcerated there, in which conversation, according to Holmes, Dewaine threatened to kill the person that Tracy was going with (R. 474).

After the trial court denied motions for judgment of acquittal (R. 611, 619), and to require the state to elect between aggravated murder counts (R. 620), the jury convicted Dewaine as charged of two counts of the aggravated murder of Flanagan, and two death specifications to each count, four

specifications in all, (1) that the homicide occurred during the perpetration of aggravated burglary, and (2) that the homicide was part of a course of conduct involving the purposeful attempt on the lives of more than one person. Dewaine was also convicted of aggravated burglary, the felonious assault of Tracy, who had been beaten on the head and arm, the kidnaping of Tracy and the attempted aggravated murder of Hurt, the security officer.

The matter proceeded to the penalty phase, and several witnesses testified on Dewaine's behalf, including his mother (R. 738), his sister (R. 725), his grandmother (R. 735), a family friend, John Davis, who was like a father to Dewaine (R. 730); Dewaine made a statement on his own behalf as well (R. 744).

The testimony at the penalty trial indicated that Dewaine was and is quite religious, a good student in school, and never had behavioral problems except when involved in arguments with Tracy and her family; he was a good worker. He had no problems with the law when a juvenile, and none as an adult except for two incidents wherein he argued with Tracy and was convicted of assault and domestic violence or family abuse.

At the argument at the penalty phase, the prosecutor was permitted to quote from an opinion of the Supreme Court of the United States that capital punishment was a legitimate response to the moral outrage of society, and the prosecutor referred to five juvenile court involvements of Dewaine, none of which exist. The trial court instructed the jury to weigh the aggravating circumstances Dewaine was convicted of committing, (four in number, two for each count of the aggravated murder of the same victim) against the mitigating factors presented. The jury recommended death, and the trial court sentenced Dewaine to death on both counts of aggravated murder (R. 813), and consecutive maximum terms of incarceration on all other counts (R. 814-815).

The Court of Appeals affirmed the decision of the trial court in all particulars, as did the Ohio Supreme Court.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD DECIDE THE EXTENT TO WHICH THE RELIABILITY OF A DEATH SENTENCE, REQUIRED BY THE EIGHTH AND FOURTEENTH AMENDMENTS, IS COMPROMISED BY THE IMPOSITION OF THE PENALTY OF DEATH FOLLOWING IMPROPER AND PREJUDICIAL ARGUMENTS BY PROSECUTORS AT THE PENALTY PHASE OF CAPITAL TRIALS, MISSTATING THE EVIDENCE AS TO THE EXISTENCE OF A STATUTORY MITIGATING FACTOR.

THE ISSUE

WHETHER A DEATH VERDICT BY A JURY IS CONSTITUTIONALLY UNRELIABLE UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES WHERE IT FOLLOWS THE FALSE STATEMENT BY THE PROSECUTOR DURING ARGUMENT AT THE PENALTY PHASE, SEEKING TO NEGATE THE EXISTENCE OF THE STATUTORY MITIGATING FACTOR OF LACK OF A SIGNIFICANT HISTORY OF PRIOR CRIMINAL CONVICTIONS AND/OR JUVENILE DELINQUENCY ADJUDICATIONS, TO THE EFFECT THAT THE ACCUSED HAD HAD FIVE PRIOR CONTACTS WITH THE JUVENILE JUSTICE SYSTEM, WHEN IN FACT THE OFFENDER HAD HAD ABSOLUTELY NO CONTACTS WITH THE JUVENILE JUSTICE SYSTEM.

One of the statutory mitigating factors required to be considered by the sentencer under Ohio's capital punishment statute is "The offender's lack of a significant history of prior criminal convictions and delinquency adjudications," R.C. 2929.04(B)(5). Petitioner presented evidence at the penalty trial that he had only two prior convictions, both involving his paramour Tracy Abernathy, and both misdemeanors. But during argument at the penalty phase, the prosecutor stated:

He was involved in the first trial, you heard with her, five different times. Five times he came into contact with the juvenile justice system, each escalating a little bit until he reached the big time. He got the gun, and he killed somebody.

(R. 771; emphasis added).

It is undisputed that the statement that Petitioner came into contact with the juvenile justice system five times is, simply, totally false. Petitioner had no juvenile record of any adjudications of delinquency, nor even any "contacts." The Court of Appeals concluded as much: "the record is clear that Poindexter had no juvenile record." (Op. p. 10). Petitioner and his witnesses so testified at the penalty trial. And our prosecutor made this erroneous statement in the final portion of the argument, when the defense could not respond. It is, of course, error for the prosecutor during

argument in any criminal case, to argue facts not in the record, State v. Dean, 74 Ohio App. 540 (1953), State v. Debo, 8 Ohio App.2d 325 (1966). This argument doubtless played a significant part in the jury's decision for death.

Under the Ohio capital sentencing scheme, the jury must first determine the existence of one or more of the statutory mitigating factors [including an open-ended factor permitting the jury to consider any other relevant mitigating factor in addition to those specifically enumerated in the statute, R.C. 2929.04(B)(7)]. The jury must then weigh the mitigating factors against the statutory aggravating factor(s) of which they have previously convicted the offender. If the jury is convinced beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors, they must return a death "recommendation." If, however, they are not convinced beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors, they must return a life recommendation. That life recommendation is absolutely binding upon all judges of all courts.

The jury's recommendation of death, therefore, is an indispensable condition precedent to a death sentence. And the Ohio Supreme Court has recognized that a capital defendant has an absolute right to have his jury participate in sentencing, State v. Penix (1987), 32 Ohio St. 3d 369, 513 N.E.2d 744: "The role of the jury is integral to the sentencing process in death cases. While a recommendation by the jury that the death penalty be imposed must be reviewed and reweighed by the trial and appellate courts, a jury decision to impose life imprisonment is final." Id., 32 Ohio St. 3d at 373, n3, 513 N.E.2d at 748.

The standard of review in situations such as this is whether "[i]t is . . . possible that the prosecutor's appeal to the jury . . . induced the jury to give Petitioner a harsher sentence than it would have otherwise." State v. Thompson (1987), 33 Ohio St. 3d 1, 15, 514 N.E.2d 407, 421(emphasis added). The existence of that possibility here

is incontrovertible. And this Court has adopted essentially the same standard, Caldwell v. Mississippi, 472 U.S. 320 (1985). Just last week, the Court declared in a similar context "Unless we can rule out the substantial possibility that the jury may have rested its verdict on the 'improper' ground, we must remand for resentencing." Mills v. Maryland, ___ U.S.___, 43 Cr.L. 3056, 3058-9 (6-8-88).

But the Ohio Supreme Court avoided the issue, and held that, while the prosecutor's comment was error, it was not plain error (there having been no defense objection), and emphasized that "it is clear that the prosecutor had intended to state that Petitioner's prior contacts were with the criminal justice system and not the juvenile justice system." Opinion, 36 Ohio St. 3d at 5.

The Court thus holds that what the prosecutor must have meant by his statement governs over that which the record indicates is the plain meaning of his statement -- that Petitioner had had five contacts with the Juvenile Justice System -- though it is clear that he had absolutely none. And, of course, mere "contacts" with either the criminal or juvenile justice system would not be relevant to the presence or absence of the mitigating factor in question, as only convictions and delinquency adjudications may be considered.

Of course, the Court does determine that the prosecutor's comments constituted error; but then proceeds to hold the error is not plain error, citing, inter alia, State v. Rahman (1986), 23 Ohio St. 3d 146, 492 N.E.2d 401. That case also held that prosecutorial misconduct in argument was not plain error under the facts and circumstances of that case.

But Rahman is quite different from this case. This is a capital case. And the comments attacked here occurred not during the guilt phase, but during the penalty phase. The jury at the penalty phase of a capital proceeding is undertaking the task of finding whether mitigating factors exist, and the further, most delicate, task of weighing the mitigating factors it has found to exist against the statutory aggravating factors of which it has already convicted the

accused.

The injection of five nonexistent juvenile contacts into the calculus skews the result. Petitioner's jury might well have concluded that the two misdemeanor convictions which actually existed constituted the statutory mitigating factor of a lack of a significant history of convictions or delinquency adjudications; but the addition of five (nonexistent) "contacts" with the juvenile justice system there is a reasonable likelihood that the jury concluded that the statutory mitigating factor did not exist (i.e., that Petitioner's prior history was "significant"), and definitely would have caused the jury to assign it less mitigating weight even if the mitigating factor was found to exist.

This error, given the standard of review, is certainly not harmless, but it is plain error of the most grievous sort. This was a close case at the penalty phase; it is not for the Ohio Supreme Court to determine what Petitioner's jury would have done had it not heard about the five nonexistent contacts with the juvenile justice system. The jury must have considered these as additional contacts, as there was no evidence presented at that point of any juvenile contacts. In determining whether Petitioner lacked a significant history of prior convictions and/or adjudications, the jury must necessarily have considered the five juvenile contacts referred to by the prosecutor.

Finally, it is to be noted that the jury would be justified in assuming that the prosecutor spoke the truth, as the prosecutor would certainly be in possession of Petitioner's prior criminal and juvenile record. The fact that the prosecutor made this reference adds to the weight the jury would give it, and to the prejudice suffered by Petitioner.

The prosecutor may well here have accidentally misspoken. But the effect upon Petitioner's jury is the same whether the prosecutor accidentally and unintentionally misspoke, or whether the prosecutor deliberately utilized improper, unfair

and "dirty tricks" in order to secure the death of another human being by unethical means. The undersigned is personally acquainted with the prosecutor who made this argument, who is a man and a lawyer of integrity, and would be fairly certain that the remark was an innocent mistake, and not a deliberate attempt to gain an unfair advantage with Petitioner's jury. But the prejudice to Petitioner's case is the same, whatever the motivation. And Petitioner is entitled to a reversal of his death sentence as a result.

Finally, it should be noted that the Ohio Supreme Court ignored the question, fairly raised in Petitioner's brief, that the failure of defense counsel to object to this argument constituted the ineffective assistance of counsel in violation of the Sixth and Fourteenth Amendments to the Constitution of the United States. Because we contend that the error is "plain error," should this Court agree, it is unnecessary to reach the ineffective counsel argument. The Court of Appeals ruled on the merits of the claim of error in the prosecutor's argument, and also specifically found that there was no ineffective assistance. The Ohio Supreme Court also ruled on the merits of the claim as "plain error," but failed to address the alternative, that the failure to object was ineffective assistance. In any event, neither Ohio appellate court held that the issue was waived because of the failure to object, and decided the issue -- incorrectly -- on the merits.

II.

IT IS TIME FOR THE COURT TO ADDRESS THE PROBLEM IN DEATH PENALTY LITIGATION CREATED BY THE INCREASING USE BY PROSECUTORS OF QUOTATIONS FROM DECISIONS OF THIS COURT, TAKEN OUT OF CONTEXT, TO PERSUADE JURIES TO EXECUTE CAPITAL DEFENDANTS.

THE ISSUE

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION ARE PREJUDICIALLY VIOLATED BY THE USE BY PROSECUTORS ARGUING FOR THE DEATH PENALTY IN THE PENALTY PHASE OF A CAPITAL TRIAL OF SELECTIONS OF PRIOR OPINIONS OF THIS COURT, OUT OF CONTEXT, TO PERSUADE THE SENTENCING JURY THAT THIS COURT APPROVES OF CAPITAL PUNISHMENT.

At the argument at the penalty trial in this case, the prosecutor, in attempting to persuade the jury to sentence

Petitioner to death, stated, after telling the jury he was quoting from an opinion of the Supreme Court of the United States:

I will quote: "capital punishment is an expression of society's moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an organized society that asks its citizens to rely upon legal processes rather than self-help to vindicate their wrongs. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law.

"When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they deserve, then there are sown (sic) the seeds of anarchy, of self-help, of vigilante justice and of lynch law."

(R. 775-776). A defense objection to this argument was denied (R. 775).

The Ohio Supreme Court merely held that Petitioner was not prejudiced by these remarks, but did hold that the remarks were not proper and cautioned prosecutors against such arguments in the future, citing State v. Byrd (1987) 32 Ohio St.3d 79, at 82-83, 514 N.E.2d 611, at 615-616.

It is important to note that in Byrd, no objection was lodged to the use of the quote. Here, a timely objection was interposed, and denied.

The use of the above quote, from Gregg v. Georgia, 428 U.S. 153, at 183 (1976), is becoming more and more and frequent in capital litigation penalty trials. There are several more instances of use of the Gregg quote in capital cases from Hamilton County which are presently in the Ohio appellate system. The use of the Gregg quote is not limited to Hamilton County, Ohio, however. There have been many instances of its use in jurisdictions in the South.

The Eleventh Circuit has had occasion to analyze the use of the Gregg quote during capital penalty trials. In Wilson v. Kemp, 777 F.2d 621 (11 Cir. 1985), the Court found reversible error in the use of the quote, and affirmed the granting of Wilson's petition for habeas corpus.

That court held that the Gregg quote was taken out of context in order to give the jury the impression that this

Court had endorsed the use of the death penalty for retributive purposes: "As used by the prosecutor, the Gregg passage conveys the impression that 'this function' -- i.e. capital punishment -- is 'essential in an ordered society.' By contrast, the Supreme Court's meaning was quite different, as shown by a reading of the entire Gregg passage in context." 777 F.2d at 625. The Court concluded as follows:

... one need only read the relevant portion of the prosecutor's closing argument to appreciate its message: the United States Supreme Court has stated that in its view, capital punishment is essential in an ordered society. The fact that many states and countries do not have capital punishment and yet enjoy ordered societies belies this conclusion, which in any event has never been expressed by the Supreme Court. . . . Therefore, we conclude that the prosecutor's use of the passage was improper argument.

The Eleventh Circuit stated the reasons that this argument, which it concluded improper, was prejudicial:

The prosecutor's selective quotation from Gregg told the jury that the Supreme Court endorses capital punishment, but also that the Supreme Court views capital punishment as essential in an ordered society. This placed the weight of opinion from the nation's highest judicial officers on the side of imposing the death penalty. . . . When core Eighth Amendment concerns are substantially impinged upon, . . . it is understandable that confidence in the jury's decision will be undermined.

777 F.2d at 627.

It is apparent that the Gregg quotation is being used all over the country by prosecutors anxious to obtain a death sentence. The use of this quote probably results from a prosecutor's seminar somewhere where the argument was urged as a way to secure a death verdict from a jury. While this is doubtless true, the use of the quotation also violates the Eighth Amendment in several respects.

In Ohio, the sentencing jury's responsibilities are limited. The jury must, at the penalty phase, first establish whether or not any mitigating factors have been established. The jury then must weigh the mitigating factors it has found to exist against the aggravating factor(s) of which it convicted the accused at the guilt phase of the trial. If the aggravating factor(s) outweigh the mitigating factors beyond a reasonable doubt, then the death penalty is required. Otherwise, the jury recommends a sentence of life, with either

20 or 30 full years to parole.

Thus, the opinion of this Court as to the desirability of the death penalty is completely irrelevant to the decision to be made by the sentencing jury. The only possible purpose for the injection of the Gregg quotation by the prosecutor is as a thinly veiled attempt to advise the jury that the Supreme Court of the United States says that it's all right to kill this defendant as a legitimate response to the public demand for retribution. And, of course, arguments for convictions or particular sentences to satisfy public demand are constitutional error, State v. Byrd, supra, State v. Davis, 60 Ohio App.2d 355, 397 NE2d 1215 (1978).

No question has been more vexatious in American Jurisprudence in the last twenty years than has capital punishment. This Court has, as has the American public, been sharply divided upon the constitutionality of capital punishment. After years of litigation, the Court has distilled the Eighth Amendment requirements to conclude that capital sentencing processes for the states which desire capital punishment be subject to definite, ascertainable standards to channel sentencing discretion so that the justice of death sentences, when imposed, be as reliable as possible. But this Court has never stated that capital punishment is essential to an ordered society.

The injection of the misrepresented position of this Court into the capital sentencing process for the purpose of obtaining the execution of a human being is an insult to this Court as well as an affront to the Bill of Rights.

The Court is urged to grant certiorari and to reverse the death sentence imposed upon Petitioner, and thereby to put a stop once and for all to the flagrant misuse of this Court in an attempt to exterminate citizens through improper, unconstitutional, and prejudicial methods.

DESPITE THE REMAND BY THIS COURT TO THE OHIO SUPREME COURT IN ROGERS V. OHIO, U.S., 106 S.Ct. 518, FOR RECONSIDERATION IN LIGHT OF CALDWELL V. MISSISSIPPI, THAT COURT CONTINUES TO AFFIRM DEATH SENTENCES WHERE JURIES HAVE RETURNED DEATH VERDICTS AFTER HAVING BEEN INSTRUCTED THAT THE JURY IS NOT ULTIMATELY RESPONSIBLE FOR IMPOSITION OF THE DEATH SENTENCE.

THE ISSUE

WHETHER THE EIGHTH AND FOURTEENTH AMENDMENTS ARE VIOLATED BY THE IMPOSITION OF THE DEATH SENTENCE AFTER A JURY DEATH VERDICT WHERE THE JURY IS INSTRUCTED THAT THEIR "RECOMMENDATION" IS ONLY A RECOMMENDATION AND THAT ACTUAL SENTENCE SHALL BE IMPOSED BY THE TRIAL COURT AFTER "ADDITIONAL PROCEDURES" ARE CONDUCTED.

THE DECISION BELOW IS IN CONFLICT WITH THE DECISION OF THIS COURT IN CALDWELL V. MISSISSIPPI.

The trial court instructed the jury at the penalty trial that:

You must understand, however, that a jury recommendation to the Court that the death penalty be imposed is just that, a recommendation, and is not binding upon the Court. The final decision as to whether the death penalty shall be imposed upon the defendant rests upon this Court after the Court follows certain additional procedures required by the laws of this State.

Therefore, even if you recommend the death penalty, the law requires the Court to decide whether or not the defendant will actually be sentenced to death or to life imprisonment.

(R. 787).

Petitioner contended below that this instruction violated the rule announced in Caldwell v. Mississippi, 472 U.S. 320 (1985), to the effect that a death sentence was constitutionally unreliable in violation of the Eighth Amendment where the sentencing jury was told prior to their decision for death that their decision would be reviewed, thus attenuating their sense of responsibility for the ultimate result.

On February 29, 1988, this Court denied the Petition for a Writ of Certiorari in Steffen v. Ohio (1988), U.S., 108 S.Ct. 1089, in a decision which generated three dissents and an opinion dissenting from the denial of certiorari with respect to the issue, present in this case, which was previously ruled upon by the Court in Caldwell.

The dissent emphasized that "a majority of this Court has never expressed a view as to the constitutional status of accurate and nonmisleading instructions that minimize jury

responsibility by emphasizing the preliminary nature of their decision." 108 S.Ct. at 1091.

Since the denial of certiorari in Steffen, the Court has granted certiorari in Dugger v. Adams ..., U.S. ..., 108 S.Ct. ..., which also involves the application and interpretation of the Caldwell rule. In this case, Poindexter, the Ohio Supreme Court has again affirmed a death sentence imposed after the jury, at the penalty trial, was given the identical instruction as that given in Steffen. Here, Justice Wright, who had dissented from the affirmance of a death sentence in a prior case in which a similar but less prejudicial instruction was given to the jury, State v. Williams, (1986) 23 Ohio St. 3d 16, 490 N.E.2d 906, changed his view and concurred in the affirmance, stating that a footnote in the decision in Darden v. Wainwright, 477 U.S. ..., 106 S.Ct. 2464, had caused him to vote to affirm in this case.

In Caldwell, the Court identified four possible areas of prejudice implicit in advice to the jury that minimized its role in the capital sentencing process: (1) a jury of laypersons might not understand the limited nature of appellate review; (2) a jury unconvinced for death might nevertheless render a death verdict to "send a message" of extreme disapproval; (3) some jurors might correctly assume that judicial review might reverse a death sentence but not a life sentence and thus might render a death verdict to delegate, and thus avoid, responsibility for making the life or death decision; and (4) jurors reluctant to vote for death, particularly on a divided jury, might rely upon the availability of judicial review to give in to a death verdict which is not their true will. Caldwell, supra., 472 U.S. at 330-333.

The dissent from the denial of certiorari in Steffen emphasized that of these four potentially prejudicial aspects of the instruction given here, "only the first is arguably not present in this case because a jury's recommendation of death recommendation of death is subject to plenary judicial review in Ohio." 108 S.Ct. at 1090.

With all due respect to the dissenting Justices, the first of these factors is also present in Ohio, on a de facto basis if not as a matter of law. To be sure, the Ohio death penalty statutes require "independent" review by the trial judge, the intermediate appellate court, and the Ohio Supreme Court, all of which are required by statute to independently consider the evidence in the case, and to weigh de novo the statutory aggravating factors against the mitigating factors presented by the evidence, and to independently determine whether the aggravating factors outweigh the mitigating factors, whether the death sentence is appropriate, and considering other capital cases, whether it is proportionate. R.C. 2929.04-.06.

The problem is, these statutory protections work to the advantage of the accused on only the rarest occasion. To date, with almost 100 individuals on Ohio's death row under the current capital statutes effective in 1981, all of two defendants were sentenced to life by trial judges following a jury decision for death. (State v. Kiser, Ross County; State v. Wright, Cuyahoga County). Only one defendant's death sentence was reduced to life imprisonment by an intermediate appellate court (State v. Donald Glenn, Fifth Appellate District, Guernsey County). And the Ohio Supreme Court has never reduced a death sentence to life under R.C. 2929.051

In State v. Williams, supra., Justice Wright, dissenting from the decision of the Ohio Supreme Court, accurately stated: "The consequence of a jury's decision regarding imposition of the death sentence in Ohio has not been diminished by the statutory provision for a de novo review. As of February 17, 1986, sixty-three death sentences had been imposed under the Ohio statute. Of that number, only one individual's death sentence was reversed by a court of appeals. Thus, although a jury's decision to recommend imposition of the death penalty may theoretically be only a recommendation, in reality, that decision is virtually final." Id., at 35 (Emphasis in the original).

Consequently, the conclusion here, and in State v. Buell (1986), 22 Ohio St. 3d 124, 489 N.E.2d 795, that the instruction is accurate Ohio law is subject to the significant qualification (which was not communicated to Poindexter's jury) that the Ohio courts were not about to reduce Petitioner's sentence if the jury recommended death; the trial court did not reduce it, the Court of Appeals did not reduce it, and the Ohio Supreme Court did not reduce it either.

It is clear that the judicial review of the jury's decision for death in Ohio, though required by statute, is illusory for all but a very few capital defendants. The prejudice inherent in an instruction such as was given here is thus magnified. Petitioner's jury was encouraged to return a death decision and was reassured that its decision will be reviewed by a trial judge after additional procedures are conducted (which cannot be read to exclude reference to further appellate processes).

But, as we have seen, and as Justice Wright noted, that further review is illusory. Except in the rarest of cases, Ohio death verdicts by juries are not overturned by the statutory "independent review" processes. Consequently, the instruction, while it may be an accurate statement of how the law reads, is not an accurate statement of how the law is actually applied.

It is unjust to sentence a man to death on the basis of a jury verdict which was rendered following an instruction that the jury's decision would be reviewed by one or more higher authorities, Caldwell, supra. It is even more unjust to sentence Petitioner to death following such an instruction and verdict where, despite the letter of the law, there is no meaningful judicial review of the jury's recommendation. The safety net that the instructions assured the jury would correct their decision for death if erroneous does not, for practical purposes, exist. And thus Petitioner labors under a death sentence following a jury verdict, the reliability of which is extremely suspect.

In State v. Williams, supra, Justice Wright dissented

from the affirmance of the death penalty on Caldwell grounds: ". . . I believe it is apparent, in light of Caldwell, that the United States Supreme Court would hold an accurate instruction such as we have here concerning postsentencing procedure to be improper and prejudicial. . . . I am sure that the type of instructions given here were most comforting. However, they were also most devastating to the defendant's right that jurors 'confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision'" 23 Ohio St. 3d at 34.

In this case, in which the Caldwell issue was disposed of in one paragraph, referring to the decision in Buell. Justice Wright concurred in a brief opinion, indicating that his prior misgivings had been resolved (against the defense) by a footnote in the decision in Darden v. Wainwright, and the instruction (the same as given here) is now believed by him to be constitutional, despite the emphatic and convincing dissent from Williams quoted above. See Darden, footnote 15, 106 S.Ct. at 2473.

The Darden footnote, however, supports Petitioner's position. That footnote distinguished Darden from Caldwell in ways that Darden can be distinguished from this case.

Here, as in Caldwell, the instruction was given at the penalty phase of the proceedings, rather than at the guilt phase, as in Darden. In Darden, the trial judge did not approve of the prosecutor's comments and instructed the jury that they were not evidence; here, we have not a comment of a mere prosecutor, but an instruction of law given by the judge which the jurors are required by the law and by their oaths to follow. Our situation is thus even more prejudicial than that in Caldwell, which, like Darden, involved only prosecutorial comment. And finally, in Darden, the comment was held not to have misled the jury into feeling less responsible than it should for the sentencing decision. The instruction here necessarily so misled the jury, especially with its emphasis

upon the nonexistent "additional procedures" which emphasized the merely preliminary nature of their decision.

The injection of the dicta in the Darden footnote into the calculus of Caldwell analysis requires this Court to grant the Petition in this case.

It is believed that this case is the first capital case the Ohio Supreme Court has reviewed in which a Caldwell instruction was given following its decision in State v. Jenkins, 15 Ohio St. 3d 164, 473 N.E.2d 264 (1984), in which, in its first review of a capital case under the present statutes, that Court stated that it preferred that such an instruction not be given. The Ohio Supreme Court ignored the fact that the trial court in this case disregarded its expression of disapproval. (Of course, in Buell, which is apparently the lead case on Caldwell instructions in Ohio, the Court indicated that it "emphatically emphasize[s] that the better procedure would be to have no comment by the prosecutor or the trial judge on the question of who bears the ultimate responsibility," 22 Ohio St. 3d at 142-144.)

But, of course, the reason that the better procedure would be not to have such an instruction as was given here is because the instruction creates a constitutionally unacceptable risk that the jury will give impermissibly slight consideration to its awesome responsibility. And that is not a matter of procedure -- it is a matter of fundamental constitutional law, the interpretation of which, in the final analysis, is this Court's responsibility.

Because much remains to be written on the slate of Caldwell jurisprudence, because the instruction here was so prejudicial, because the Court is still attempting to eliminate confusion in the application of Caldwell by the lower courts, *viz. Dugger v. Adams*, and the dissent in Steffen, the Court is most respectfully urged to grant the Petition herein, to review the judgment below, and to reverse Petitioner's death sentence.

THE EIGHTH AND FOURTEENTH AMENDMENTS REQUIRE THAT WHERE STATES GRANT PLENARY REVIEW ON THE MERITS BY THE STATE SUPREME COURT OF ALL APPEALS WHERE CONVICTIONS AND DEATH SENTENCES HAVE BEEN AFFIRMED BY THE INTERMEDIATE APPELLATE COURTS, THE STATE SUPREME COURT MUST GIVE FULL REVIEW TO EACH CONSTITUTIONAL ISSUE RAISED BY THE CONDEMNED APPELLANT, AND MAY NOT CONSTITUTIONALLY DISPOSE OF SUCH ISSUE SUMMARY.

THE ISSUE

WHETHER THE EIGHTH AMENDMENT REQUIREMENT OF RELIABILITY IN THE IMPOSITION OF THE DEATH SENTENCE REQUIRES A STATE SUPREME COURT, MANDATED CONSTITUTIONALLY TO CONSIDER APPEALS WHERE THE DEATH SENTENCE HAS BEEN AFFIRMED, TO GIVE FULL REVIEW TO EACH ISSUE RAISED BY THE CAPITAL DEFENDANT UPON HIS APPEAL TO THAT COURT.

In this case, the only syllabus prepared by the Ohio Supreme Court states as follows:

When issues of law in capital cases have been considered and decided by this court and are raised anew in a subsequent capital case, it is proper to summarily dispose of such issues in the subsequent case.

Ohio follows the rule that, except in *per curiam* opinions by the Ohio Supreme Court, the only binding rule of law in a decision is that set forth in the syllabus.

The Ohio Supreme Court in this case summarily rejected without exposition Petitioner's contentions (1) that the trial court's instructions to the jury that their recommendation was not binding and thus impermissibly reduces the jury's sense of responsibility and reduces the reliability of the death sentence (under Caldwell v. Mississippi, *supra*); (2) that the use of the same felony twice, to elevate the murder to aggravated murder, and then again to capital aggravated murder was unconstitutional; (3) that the Ohio death penalty statute was unconstitutional and applied in a racially biased manner; and (4) that the statutorily required proportionality review was constitutionally infirm because it did not permit consideration of cases where the death penalty was not imposed. The summary rejection of these issues consumed only a few paragraphs. See 36 Ohio St. 3d 3 and 4. Thereafter, the Ohio Supreme Court applied the new rule coined in this case with a vengeance in State v. Spisak, 36 Ohio St. 3d 80, 521 N.E.2d 800, affirming in but five pages a conviction and death sentence in a case in which "Appellant's merit brief,

reply brief and attached appendix filed in this court comprise over nine hundred pages, all of which supplement a substantial, but average-sized, record of the proceedings in the lower courts," *Id.*, 521 N.E.2d at 802, n1. Spisak alleged no less than sixty-four claims of error, practically all of which were summarily rejected without a meaningful discussion by the Ohio Supreme Court. In *Spisak*, the Ohio Supreme Court cited this case, *State v. Poindexter*, as the controlling authority permitting it to summarily decimate Spisak's case. And, as has been demonstrated, a goodly portion of Petitioner's appeal to the Ohio Supreme Court was disposed of in the same manner.

The Ohio Supreme Court is a discretionary review court, possessing the ability to refuse to hear cases on their merits, subject to certain exceptions. One of those exceptions, in which the Ohio Supreme Court is required to decide the merits of an appeal, is where a conviction and death sentence have been affirmed by an intermediate appellate court, O. Const. Art. IV.

Petitioner contends here that where a state guarantees a merit appeal to the state supreme court in capital cases, then the right to a meaningful appeal to that court is guaranteed by the due process clause of the Fourteenth Amendment and the prohibition against cruel and unusual punishments contained in the Eighth Amendment of the Constitution of the United States.

In *Gregg v. Georgia, supra*, this Court applauded the Georgia statutory appeal process, which was, according to the Court, "designed to assure that the death penalty will not be imposed on a capriciously selected group of convicted defendants. . . . It is apparent that the Supreme Court of Georgia has taken its review responsibilities seriously." 428 U.S. at 205, 96 S.Ct. at 2940. This Court there concluded that "[t]he provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty." 428 U.S. at 206, 96 S.Ct. at 2940.

But here, the Ohio Supreme Court abandoned its

constitutional duty to give a meaningful appeal to this Petitioner, whose conviction and capital sentence had been affirmed by the intermediate appellate court, and disposed of several constitutional claims summarily. These claims include one (the *Caldwell* issue) in which the giving of an identical instruction as that given here generated three dissents from this Court's denial of certiorari in *Steffen v. Ohio, supra*.

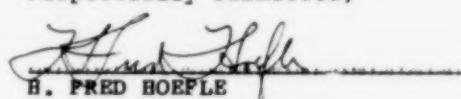
Certainly, these are not frivolous issues, and Petitioner's death sentence cannot be held to be constitutionally reliable when no less than four substantial constitutional questions are not given full consideration by a state appellate court required by its own Constitution to do so.

Where states grant rights to those they seek to prosecute, and even to exterminate, such as Petitioner here, the due process clause of the Fourteenth Amendment to the United States Constitution protects those rights, *Vitek v. Jones*, 445 U.S. 480, 100 S.Ct. 1254. And where the lives of those citizens is claimed by such a state to be forfeit, the Eighth Amendment guarantees that the states shall faithfully extend to those defendants those rights, including the right to a meaningful appeal, which the state has extended to the accused, *Gregg v. Georgia, supra*.

CONCLUSION

For the reasons stated, the Court is urged to grant this petition for a Writ of Certiorari, and to reverse the convictions and death sentence imposed by the Ohio Courts.

Respectfully submitted,



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